belligerent to bring an uncondemned prize into a neutral port to avoid recapture [as seems to have been the motive in the principal case] is such a grave offense against the neutral state that it ipso facto subjects the prize to forfeiture, and * * * the vessel should be restored to the owners on the payment of costs." MOORE, op. cit., VII. 937. The holding of the court was, therefore, in line with the rulings and practice of over a century.

Although the Supreme Court did not in the opinion handed down in the principal case expressly recognize that the interpretation put upon the Treaty by the political department of the government in the course of diplomatic reclamation was binding upon the courts, it is submitted that that principle governed in arriving at the decision. H. C. S.

ENJOINING AN ELECTION AT THE SUIT OF TAXPAYER.—It is commonly stated that equity has not power to enjoin an election. MCCRARY, ELECTIONS, 3rd Ed. §351. This statement cannot be taken without some qualification. When the election is being held under a valid law, the requirements of which are observed, there can be no doubt but that the injunction should be refused. The question in such a case is a poltical one and equity will not interfere to decide questions which are truly of a political nature. *Morgan* v. *Wetzel County Court,* 53 W. Va. 372, 44 S. E. 182; *Oden* v. *Barber,* 103 Tex. 449, 129 S. W. 602. But in cases where the election is to be held under an unconstitutional law, most of the cases hold that equity has jurisdiction to enjoin. *Mayor, etc. of Macon* v. *Hughes,* 110 Ga. 795, 36 S. E. 247; *Connor* v. *Gray,* 88 Miss. 489, 41 So. 186 (semble); contra, *Illinois* v. *Galesburg,* 48 Ill. 485. The question in such a case is certainly a judical one and is capable of being tried by a court of equity.

In a recent case, *Power* v. *Ratliff* (Miss. 1916), 72 So. 864, which was a combination of two suits to enjoin the submission to the vote of the people of a prohibition law and a law providing for the appointment of game wardens, the relief was denied. In both suits the plaintiffs contended that the constitutional amendment which allowed a referendum was void because not regularly passed. It was stated in the dissenting opinion that the amendment was clearly invalid because of the method of its adoption and this is tacitly admitted in the prevailing opinion, which however did not consider this point. The majority opinion disposes of the case upon two grounds: one, that these particular plaintiffs have not sufficient interest in the result to complain; two, that equity has no jurisdiction to grant the relief demanded. Having disposed of the first point, the decision on the second is unnecessary and is hence mere obiter dictum.

However, the question of jurisdiction is an interesting one. It is of course, well settled that equity will not enjoin the passing of an act by the legislature even though the act would be clearly unconstitutional if passed. *McChord* v. *Louisville and N. R. Co.,* 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; *New Orleans Water Works Co.* v. *New Orleans,* 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518. This position is taken in order to prevent judicial interference with the functions of the legislature; there is also

an efficient remedy after the legislation is passed. This objection does not apply to an injunction against the submission of a measure under a referendum law. There is no interference with the functions of a coordinate branch of the government. The legislature has already completed its action. The submission of a measure to vote of the people cannot be regarded as an act of the legislature. The referendum vote is the act of the people and not of the legislature: there is no political objection to enjoining such an election if the provision under which the election is held, is unconstitutional. An injunction against the election in the principal case would prevent an illegal, useless and expensive act without jarring the fine mechanism of our tri-branched system of government. If no political question is involved in the granting of the injunction it is difficult to see why a court of chancery cannot enjoin an illegal election.

There is another question involved in the *Power* case, namely what interest is sufficient upon the part of the plaintiff to entitle him to an injunction against an election. The first bill was brought by two taxpayers. The submission o the voters was to be at a regular election and so the additional expense and the additional tax burden on the plaintiffs was insignificant. That a taxpayer is entitled to an injunction against an illegal election has been affirmed in: *Mayor, etc. of Macon* v. *Hughes,* supra; *De Kalb County* v. *City of Atlanta,* 132 Ga. 727, 65 S. E. 72; and denied in *Roudanez* v. *New Orleans,* 29 La. Ann. 271; *McAlister* v. *Millwee,* 31 Okla. 620, 122 Pac. 173, 40 L. R. A. N. S. 576. The principal case is clearly distinguishable from *Fletcher* v. *Tuttle,* 151 Ill. 41, in which case the court denies equitable relief to secure to the plaintiff his right to vote and be voted for. The rights insisted upon in the *Fletcher* case are political ones and whether equity should protect these rights depends in a large degree upon whether such rights are regarded as being civil as well as political as in the leading case of *Ashby* v. *White,* 2 Ld. Raym. 938, 950. There is a conflict as to whether the latter case is law in this country—the state courts are at variance on this point. Surely in those jurisdictions which recognize the doctrine of *Ashby* v. *White,* equity should protect the right to vote. The doctrine of the *Fletcher* case, however, has no application to the principal case.

It was pointed out in *People* v. *Galesburg,* supra, that in the case of an invalid election of officials, there is an adequate remedy at law, i. e., by resorting to the common law writ of quo warranto. But such a writ does not take care of the situation in the *Power* case. Moreover even where the election is of officials, the writ would not prevent the imposition of taxes to pay for the expenses of the election. Some of the courts intimate that equity should not enjoin the election, but only enjoin the payment of expenses of the same. But why wait? It would be safer and more sensible to enjoin the election in the first instance. The court in the Power case intimates that if the proposed election authorized bond issues, or directly affected plaintiffs' property rights, it would consider that the plaintiffs were in a position to complain. But there are property rights involved; in particular instances, the additional tax resulting from the expenses of the

illegal election might be considerable. It is true that Judge Cooley said in *Miller* v. *Grandy*, 13 Mich. 549, that a single taxpayer has no right to complain until the amount is assessed against him. The learned judge bases his argument upon public policy; the public welfare demands that a whole assessment should not be enjoined. It is inconceivable that he would apply the rule to such a case as the principal one. Surely it does not interfere with the public welfare to enjoin an election which is useless at the best. Even if each taxpayer would have a remedy at law for the recovery of taxes which he was wrongly forced to pay, equity should grant an injunction to prevent multiplicity of suits. This point is developed in *Mayor, etc. of Macon* v. *Hughes*, supra. This much cannot be doubted: that equity has jurisdiction to enjoin an election which is clearly illegal; that it can do so at the suit of a taxpayer without doing violence to the theories upon which equity grants relief; and that in so doing a desirable result is obtained without interfering with political affairs. T. E. A.

WHAT SERVICE GIVES JURISDICTION IN PERSON.—On March 6th, 1917, the Supreme Court of the United States, in the case of *McDonald* v. *Mabee*, reversing the decision of the Supreme Court of Texas, in 175 S. W. 676, held that a judgment in foreclosure proceedings in which the defendant was served only by publication did not merge the cause of action so as to bar a suit on the original notes for the balance unpaid by the sale of the mortgaged property on the foreclosure, although the statute of the state declared such service sufficient to give jurisdiction in personam, and the defendant was a citizen of the state and bound by the law so far as it was constitutional. The only case in the United States squarely sustaining the Texas decision on similar facts, so far as the writer is aware, is the often cited case of *Henderson* v. *Staniford* (1870), 105 Mass. 504, 7 Am. Rep. 551, in which it was held that action on the original cause was barred by the plaintiff recovering a judgment in a suit in California, where the parties resided, and in which the defendant was served only by publication. The court said that if the service so made was defective the defendant could waive the defect, and did so by urging the judgment as a defence. It is no doubt true that a defendant can waive service by appearing in the suit, as is done every day; but this defendant did and proposed no such thing; and no appearance by him even if made could cure the defect unless such appearance were entered before judgment, so as to confer jurisdiction on the court to render the judgment. That a judgment recovered by such service was no bar, and was not available as a defence against a new action on the original cause, had, at the time this decision was rendered, been held in other states. *Whittier* v. *Wendell* (1834), 7 N. H. 257; *Middlesex Bank* v. *Butman* (1848), 29 Me. 19. Thus considered, the decision of the Supreme Court of the United States in *McDonald* v. *Mabee* would seem to affirm a doctrine sufficiently clear on principle to require neither proof nor precedent to support it, were it not for the decisions to the contrary cited. But these decisions are not so contrary as they seem; for they were rendered